

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33080

TERRY R. MACE and DONALD MACE,
Plaintiffs Below, Appellants

vs.

FORD MOTOR COMPANY, a Delaware corporation;
LIBERTY MUTUAL INSURANCE COMPANY, INC., a Massachusetts
corporation; and BERT WOLFE FORD, INC., a West Virginia corporation,
Defendants-Below,

LIBERTY MUTUAL INSURANCE COMPANY, INC.,
Defendant-Below, Appellee

Hon. Louis H. "Duke" Bloom, Judge
Circuit Court of Kanawha County
Civil Action No. 04-C-223

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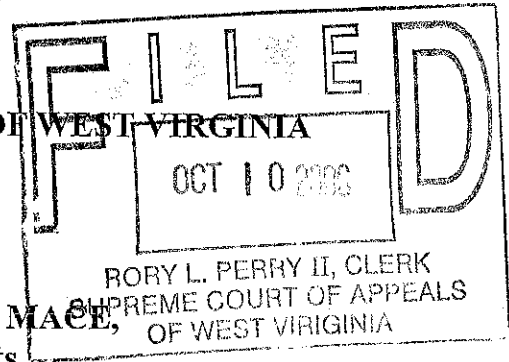


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I. INTRODUCTION

This is the Reply Brief of the Appellee, Liberty Mutual Insurance Company, Inc., [Liberty], in an appeal from an order of the Honorable Louis H. "Duke" Bloom, Judge of the Circuit Court of Kanawha County in a suit instituted by the Appellants, Terry R. Mace and Donald Mace [Maces], for negligent spoliation of a vehicle sold by the Maces to Liberty for salvage in conjunction with a total loss claim and in accordance with West Virginia law. Based upon undisputed evidence that the Maces failed to meet several of the elements of a cause of action for negligent spoliation, the Circuit Court granted summary judgment, but did not address additional elements for which the evidence was also undisputed.

Liberty asserted five cross-assignments of error in its Brief of the Appellee: (1) the Circuit Court erred in failing to grant summary judgment where there is no evidence that the Maces' vehicle was altered, in any way, when it was owned by Liberty; (2) the Circuit Court erred in failing to grant summary judgment where the evidence was undisputed that, under West Virginia law, the Maces' claim against the Defendant, Ford Motor Company, Inc. [Ford], would have survived a motion for summary judgment; (3) the Circuit Court erred in failing to grant summary judgment where the evidence was undisputed that the Maces settled their claim against Ford for \$50,000, which was in excess of their special damages; (4) the Circuit Court erred in failing to grant summary judgment where the Maces' expert could not opine, to a reasonable degree of professional certainty, that the accident was caused by a product defect, rather than an unrepaired ball joint; and (5) the Circuit Court erred in failing to grant summary judgment where the Maces never indicated that they intended to file a product liability suit, voluntarily transferred ownership of their vehicle to Liberty, and imposing liability for negligent spoliation due to the sale of one's own property would constitute a violation of the United States Constitution and the West Virginia Constitution.

Although the Rules of Appellate Procedure clearly provide that an appellee may cross-assign error,¹ the Maces are completely dismissive in their Reply Brief to the point of being non-responsive to Liberty's assignments of error. The Maces' inflammatory rhetoric notwithstanding, Liberty respectfully submits that there were additional fatal defects in the Maces' negligent spoliation claim that should have been addressed by the Circuit Court.

II. CROSS-ASSIGNMENTS OF ERROR

A. BECAUSE THERE IS NO EVIDENCE THAT THE VEHICLE WAS ALTERED WHEN IT WAS OWNED BY LIBERTY, JUDGE BLOOM SHOULD HAVE CONCLUDED THAT LIBERTY WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THIS ISSUE.

To be liable for "negligent spoliation," a defendant has to be guilty of "spoliation of the evidence."² "Spoliation of evidence" consists of the "destruction, mutilation, or significant alteration of potential evidence."³ Unless Liberty destroyed, mutilated, or significantly altered the evidence, there is simply no negligent spoliation. The Maces have cited no authority for their "spoliation by sale" theory because there is no authority.

Here, the evidence is undisputed that Liberty did not destroy, mutilate, or significantly alter the Explorer— it left Liberty's ownership and control in the same condition as when Liberty assumed control. After Liberty sold the vehicle, the third-party altered it by removing certain parts. If a cause

¹See R. App. P. 10(f) ("Appellee, if he is of the opinion that there is error in the record to his prejudice, may assign such error in a separate portion of his brief and set out authority and argument in support thereof. Such cross assignment may be made notwithstanding the fact that appellee did not file a separate petition for an appeal within the statutory period for taking an appeal. Appellant may answer the cross assignment of error in his reply brief.").

²Syl. pt. 8, *Hannah v. Heeter*, 213 W. Va. 704, 584 S.E.2d 560 (2003).

³Syl. pt. 10, *Heeter*, *supra*.

of action for negligent spoliation exists in this case it is against the third-party not Liberty. Selling a vehicle acquired during settlement of a total loss claim is not "spoliation."

Incredibly, the entirety of the Maces' responses to this cross-assignment of error is as follows:

Liberty urges that "[b]ecause there is no evidence that the vehicle was altered when it was owned by Liberty, Judge Bloom should have concluded that Liberty was entitled to judgment as a matter of law on this issue." This assertion, of course, ignores the reality that, the moment Liberty delivered possession of the vehicle to the operator of the salvage yard, its destruction as evidence was assured.⁴ In Liberty Mutual's own words, when a vehicle is sold for salvage, it gets "'cut up . . . for parts,' which, of course, is how salvage works." Appellee's Brief at p. 18. Knowing this, Liberty owed a duty to see that the evidence was not "cut up for parts" and thereby destroyed.

Reply Brief at 11. Lest there have been any doubt, the Maces have removed it, they are asserting a completely unprecedented argument for "negligent spoliation by sale" of one's own property.

In this case, the following was undisputed:

- The Maces presented a claim for the total loss of their vehicle.
- Liberty paid the Maces for the total loss of their vehicle.
- The Maces, pursuant to West Virginia law, transferred title, possession, and ownership of the vehicle to Liberty.
- Liberty, pursuant to West Virginia law, sold the vehicle it now owned for salvage.
- The Maces never indicated that they intended to file suit; the Maces have admitted that they did not contemplate suit; and the Maces were given an opportunity to inspect and photograph the vehicle.

⁴Obviously, had the Maces or their counsel acted with alacrity, rather than being dilatory in their claims against Ford, an inspection of the vehicle and a request for its preservation could have been made prior to any salvage activities by the company that purchased the vehicle from Liberty. Thus, it is inaccurate to say that the "destruction" of the vehicle "as evidence was assured."

- Liberty never promised that it would preserve the vehicle; Liberty never engaged in any investigation of a potential claim against Ford; and the circumstances of the accident, involving Ms. Mace's collision with a guardrail after swerving to avoid another vehicle on an icy roadway, did not indicate that product defect was the cause of the accident.
- The vehicle left Liberty's ownership and possession, pursuant to West Virginia law, in the exact same condition in which it was delivered to Liberty.

Other courts have rejected the Maces' "spoliation by sale" theory.

In *Metlife Auto & Home v. Joe Basil Chevrolet, Inc.*,⁵ the fact that the insurer which assumed ownership and control of a vehicle sold the vehicle to a salvage company, as in the instant case, was held to defeat a claim for negligent spoliation. Specifically, the court noted the "problematic . . . notion of holding a third party liable for destroying or discarding its own property under such circumstances[.]" because "such liability would in our view constituted an unwarranted infringement on property rights. . . . In that connection, we note that, prior to the disposal of the fire-damaged vehicle, Royal had assumed ownership of the vehicle upon indemnifying its insured, Basil Chevrolet."⁶

Likewise, in *Sterbenz v. Attina*,⁷ an insured, as in this case, instituted suit against her insurer, claiming that its sale of a vehicle in which her husband died constituted negligent spoliation of evidence, contending that she could have maintained a successful products liability action except for the unavailability of the vehicle. The court granted the insurance company's motion for summary judgment, under circumstances nearly identical to those presented here, noting that, "pursuant to the

⁵753 N.Y.S.2d 272, 279 (App. Div. 2002), *aff'd* 807 N.E.2d 865 (N.Y. 2004).

⁶753 N.Y.S.2d at 279 (citations omitted).

⁷205 F. Supp. 65, 72 n.9 (E.D.N.Y. 2002).

contract of insurance, defendant paid for the vehicle, plaintiff accepted payment, and defendant took ownership of the vehicle and exercised '[its] right to dispose of [its] property as [it chose]'⁸

Similarly, in *White v. Ford Motor Company*,⁹ an employee sued his employer's insurance company for negligent spoliation arising from its sale of the vehicle after it acquired the vehicle in a total loss claim and sold it for salvage. The court, as did the courts in *Metlife* and *Sterbenz* rejected the claim, noting that, "Here, plaintiffs could not transfer a possessory interest in the automobile to Grange, because Grange had already purchased the vehicle from plaintiffs' employer, and thus was owner of the vehicle."¹⁰

Finally, in *Fontanella v. Liberty Mut. Ins. Co.*,¹¹ the Defendant was sued after purchasing a vehicle during the adjustment of a total loss. Again, under circumstances nearly identical to those in the instant case, involving the same defendant as in the instant case, the Court held that there was absolutely no cause of action:

In this case, the plaintiff, Rose Fontanella, sold the vehicle to Liberty after the accident in question. The bill of sale contains no restrictions on Liberty's ability to dispose of the vehicle. Such a provision could presumably have been written in the contract, but it was not. The plaintiffs make no breach of contract claims. Under these circumstances, Liberty owned the vehicle outright and owed no duty to anyone, including the plaintiffs, not to dispose of it as Liberty saw fit.¹²

"It is axiomatic that a [person] may dispose of his or her property in any manner chosen so long as the disposition is not prohibited by law or public policy.' There is no public policy that prohibits

⁸*Id.* at 72 (citation omitted).

⁹142 Ohio App. 3d 384, 755 N.E.2d 954 (2001).

¹⁰*Id.* at 958.

¹¹1998 WL 568728 (Conn. Super. 1998).

¹²*Id.* at *2.

someone who has purchased an automobile from subsequently disposing of that vehicle.”¹³ “Moreover, even if there were to be a rule of law prohibiting a third party who owns property involved in an accident from subsequently disposing of that property, such a rule would make no sense when applied to a third party who purchases the property *after* the accident from the very person who claims to have been injured by the accident and who now claims that she needs the property as evidence.”¹⁴ In such circumstances, the burden to preserve property rests with the injured original owner who “should plainly not sell the property in the first place[,]” or “[a]t a minimum, . . . place the desired restrictions on subsequent disposition in the contract of sale.”¹⁵ Absent undertaking these simple steps, “plaintiffs are simply in no position to complain about the asserted loss that has resulted.”¹⁶ This analysis applies with equal force to Liberty in the instant case. The “sale” of a vehicle is not “spoliation” of the vehicle and to so find violates the policy of the law that “favors the free alienation of property.”¹⁷

Having no contrary authority to the sound principle that one cannot be held liable for selling one’s own property, particularly when such sale is mandated by state law and without any notice that the property being sold is allegedly needed by a third-party in a potential lawsuit, the *Maces* cite none. They do not even bother to attempt to distinguish the well-reasoned decisions in *MetLife*,

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.*

¹⁷63C Am. Jur. 2d *Property* § 35 at 103 (1997).

Sterbenz, White, and Fontenella.¹⁸ Consequently, this Court should rule that their claim for negligent spoliation is barred because the Maces admit that there no evidence that Liberty did anything to change the vehicle while it was in its ownership and possession.

B. BECAUSE THE EVIDENCE IS UNDISPUTED THAT MACES' CLAIM AGAINST FORD WOULD HAVE SURVIVED SUMMARY JUDGMENT, JUDGE BLOOM SHOULD HAVE CONCLUDED THAT LIBERTY WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THIS ISSUE.

To prevail on a negligent spoliation claim, a plaintiff must prove "the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action."¹⁹ Where a party can still proceed with the claims against the tortfeasor, there is no cause of action for negligent spoliation. Because the evidence is undisputed that the Maces in the case could—and did—successfully prosecute their products liability claim against Ford, and that their claim would have survived summary judgment, Liberty was entitled to judgment as a matter of law.

Incredibly, the entirety of the Maces' responses to this cross-assignment of error is as follows:

Liberty Mutual alleges that "because the evidence is undisputed that Maces' claim against Ford would have survived summary judgment, Judge Bloom should have concluded that Liberty was entitled to judgment as a matter of law on this issue." Here, Liberty Mutual would have this Court ignore material issues of fact, including facts that (1) former Ford Vice-president Thomas Faheaney had filed a sworn affidavit averring that the spoliated evidence was vital to plaintiff's ability to prevail in a pending or potential civil action and that plaintiffs encounter extreme difficulty in defending against Ford's spoliation motions in such cases, and (2) in their case

¹⁸Indeed, *Fontenella* was a suit involving Liberty. The Maces want to rely upon Liberty's filing of what they inaccurately reference as a "product liability suit" against Ford, which was actually an unsuccessful subrogation claim, but ignore the fact that Liberty had already prevailed on a claim that it could not sell a vehicle purchased for salvage in a total loss claim without risking liability for negligent spoliation.

¹⁹Syl. pt. 8, *Hannah*, *supra*.

against Ford, the Maces would have the burden of proof on the issue of proximate cause and, even though they could show the existence of a design defect, the absence of the vehicle would allow Ford to suggest to the trial court that, because they could not prove that the "unrepaired ball joint" or some other mechanical failure was not the proximate cause of the accident, Ford should be granted summary judgment. Without a fully-developed record, it is exceedingly presumptuous to suggest that the Maces would have survived a motion for summary judgment in their case against Ford. Judge Bloom's premature order deprived the Maces of the opportunity to develop those facts.

Reply Brief at 11-12. This effectively constitutes a judicial admission by the Maces that summary judgment for Liberty on their negligent spoliation claim was proper.

First, Mr. Faheany's affidavit, drafted by the Maces' counsel, was significantly retracted by Mr. Faheany in his deposition testimony, which is recited in Liberty's earlier brief. Second, Mr. Faheany's testimony involved the inherent defects in all Ford Explorers manufactured over a number of years, including the year the Maces' vehicle was manufactured, which this Court has held entitles a product liability plaintiff to trial. Third, Mr. Faheany testified, and the Maces acknowledge, not that their claim would have been completely defeated by the removal of a few parts, but that Ford might have attempted to use the removal to make their claim more difficult, an admission that the Maces' opportunity to "prevail" was not eliminated, but only made more "difficult."²⁰ Fourth, Mr. Faheany was obviously not an expert in West Virginia product liability law and admitted that he had

²⁰Depo. Tr. of Thomas J. Faheany, attached as Exhibit B to Liberty's Summary Judgment Reply, at 169 ("Q. Many times a vehicle is altered or destroyed in the accident itself, is it not? A. That's correct. Q. And that doesn't prevent the plaintiff from successfully product liability case against the manufacturer, isn't that correct? A. Yes, but the plaintiff has the opportunity [to] analyze what the - hundred percent of the residual of the vehicle and present its explanation to the court or the jury as to what had happened. If the parts are gone, they can't do that. Q. Well, what specifically do you believe that Ford Motor Company could have argued with respect to its defense of the product liability case that we're here discussing today? A. Well, I don't know.") (emphasis supplied).

no opinion regarding whether the Maces' claim would have survived summary judgment.²¹ Fifth, because of the unrepaired ball joint, of which Mr. Faheany was not aware until his deposition, he testified that he could not have excluded the ball joint as the cause of the accident and, therefore, it exists as a cause independent of the removal of parts that would have defeated the Maces' claim.²² Finally, and most importantly, the Maces now effectively admit that they had not developed enough facts to allow their expert to testify to a reasonable degree of certainty that product defect, rather than an unrepaired ball joint, was the cause of the accident. The Maces never argued to the Circuit Court that summary judgment was "premature." They never filed a R. Civ. P. 56(f) affidavit. Rather, they rested upon the evidence that they presented in conjunction with their opposition to Liberty's motion

²¹*Id.* at 168 ("A. I think Ford Motor Company with some justification would argue that their opportunity to defend the case had been subverted by loss of that material, and that's possibly very true. There could have been damage to the suspension arms that might have been very revealing. Q. You can't say that to a reasonable degree of scientific certainty, can you? A. What? That there couldn't have been? Q. That Ford Motor Company could have been successful in making that argument. A. That's not that's a legal conclusion . . .")(emphasis supplied); *see also id.* at 199 ("Q. Do you know West Virginia law in spoliation of evidence? A. No. Q. Do you know [that] West Virginia law specifically allows a plaintiff in a product liability case against the vehicle manufacturer to proceed even though the vehicle has been altered? A. I don't know.").

²²As the Maces' counsel well knows, there can be a number of other successful defenses to claims against Ford arising from rollovers. *See Olson v. Ford Motor Co.*, 2006 WL 889536 at *2 (D.N.D.)("Olson was successful in persuading the jury that the decedent's vehicle was defective, and Ford Motor Company was successful in persuading the jury that the decedent was 50% at fault for the accident, which inherently included the result that no damages were awarded.")(Edgar F. Heiskell, III, counsel for plaintiff); *Brown v. Ford Motor Co.*, 67 F. Supp. 2d 581 (E.D. Va. 1999)(affirming verdict for Ford in rollover case in which Mr. Heiskell was counsel for plaintiff and contributory negligence was asserted as the defense); *Chewning v. Ford Motor Co.*, 35 F. Supp. 2d 487 (D.S.C. 1998)(dismissing suit against Ford and its expert witness instituted by Mr. Heiskell after Ford prevailed in an earlier rollover suit). The perception that a party might enjoy more success against an insurance company, which has never defended a rollover suit, rather than against an automobile manufacturer, which has enjoyed success in defending such suits, is an insufficient reason to justify imposing liability for negligent spoliation on the insurance company.

for summary judgment. It is simply too late to argue that, with additional time, they might have developed the evidence sufficient to raise a genuine issue of material fact.²³

As noted in Liberty's Brief of the Appellee, a perfect example of how a plaintiff has no cause of action for negligent spoliation unless the evidence involved is "vital to a party's ability to prevail in the pending or potential civil action" is *Adkins v. K-Mart Corp.*,²⁴ where the plaintiffs sued the manufacturer and distributor of a gas grill that exploded injuring one of the plaintiffs. Unfortunately for the plaintiffs, the grill was lost by their homeowners' insurer and was not available for inspection by the defendants. Reversing the award of summary judgment for the defendants, this Court held that direct evidence of the precise cause of the grill explosion was not necessarily required and circumstantial evidence could be sufficient:

[T]he Appellants maintain that they can present evidence that they purchased an assembled Char-Broil gas grill from K-Mart, that the gas grill exploded, causing both physical injuries and property damage, that they did not alter or modify the grill in any manner, and that an expert opined that the fire was possibly caused by a defect in the materials or the assembly of the grill. Accordingly, a genuine issue of material fact clearly exists regarding whether or not a defect in the gas grill or in the assembly of the gas grill caused the grill to explode.²⁵

²³Syl. pt. 1, *Powderidge Unit Owners' Ass'n v. Highland Properties*, 196 W. Va. 692, 474 S.E.2d 872 (1996) ("An opponent of a summary judgment motion requesting a continuance for further discovery need not follow the exact letter of Rule 56(f) of the West Virginia Rules of Civil Procedure in order to obtain it. When a departure from the rule occurs, it should be made in written form and in a timely manner. The statement must be made, if not by affidavit, in some authoritative manner by the party under penalty of perjury or by written representations of counsel. At a minimum, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified 'discoverable' material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.").

²⁴204 W. Va. 215, 511 S.E.2d 840 (1998).

²⁵*Id.* at 221-22, 511 S.E.2d at 846-47 (emphasis added and footnotes omitted).

In proving the element of proximate cause, we adopt the reasoning of the court in *Smith* that,

in order for a plaintiff to show proximate cause, the trier of fact must determine that the lost or destroyed evidence was so important to the plaintiff's claim in the underlying action that without that evidence the claim did not survive or would not have survived a motion for summary judgment Metropolitan argues that a plaintiff, in order to be able to file an action alleging spoliation of evidence against a third party, must first file an action pursuing the underlying cause of action and be denied a recovery in that underlying action. We disagree. If we use the summary-judgment standard as a guide, there will be no need for a plaintiff to waste valuable judicial resources by filing a futile complaint and risking sanctions for filing frivolous litigation. The plaintiff can rely upon either a copy of a judgment against him in an underlying action or upon a showing that, without the lost or destroyed evidence, a summary judgment would have been entered for the defendant in the underlying action.²⁸

It was the Maces' burden to meet this standard, i.e., to develop evidence sufficient to demonstrate that their claim was "spoiled," i.e., it either (1) did not survive summary judgment or (2) would not have survived summary judgment. This "summary judgment" standard was designed to prevent what is being attempted here, for the Maces to have it both ways and settle their case against Ford for a substantial amount, yet proceed against Liberty contending that their claim was "spoiled." Obviously, the Maces could not satisfy *Hannah's* initial requirement, the production of a summary judgment order in favor of Ford, nor can they meet the second— that "summary judgment would have been entered for the defendant in the underlying action." Accordingly, Liberty was entitled to summary judgment on the Maces' claim for negligent spoliation on this element.

²⁸*Id.* at 714, 584 S.E.2d at 570 (emphasis added).

Likewise, in the instant case, the Maces would have survived any summary judgment motion by Ford because they have evidence that Ford knew Explorers to be unreasonably predisposed to rollover; their expert witness would testify that Explorers are defectively designed, manufactured, advertised, marketed, and distributed; and there would be a genuine issue of material fact regarding whether a non-defective vehicle would rollover under the conditions present in the accident. We know that the vehicle was not essential to the Maces' claims against Ford because many plaintiffs have successfully prosecuted products liability cases arising from Explorer accidents where the vehicle or component parts were subsequently unavailable.²⁶ Thus, the Maces cannot argue that their "inherent design defect" would not have survived summary judgment.

Essentially, the Maces argue that if a underlying claim is never instituted or is compromised for less than what the plaintiff alleges the claim was worth, the issue of summary judgment can never be ascertained because the underlying claim never progressed to the summary judgment stage. Obviously, however, the adoption of the "summary judgment" standard by this and other courts²⁷ constitutes a rejection of this argument. Indeed, this Court specifically held in *Hannah* that there can be no cause of action for negligent spoliation if the cause of action allegedly compromised by the spoliation of the evidence would have survived a motion for summary judgment:

²⁶See *In re Bridgestone/Firestone, Inc.*, 2005 WL 1030422 at *4 (S.D. Ind.) ("We have previously rejected Ford's argument that the unavailability of the subject Explorer for expert examination in itself defeats a plaintiff's claim as a matter of law. . . . As we explained . . . , the claim of design defect in the Explorer can be supported by testing on like vehicles and other circumstantial evidence."); *In re Bridgestone/Firestone, Inc.*, 287 F. Supp. 2d 938, 939 (S.D. Ind. 2003) ("Here, we have no such evidence of bad faith, but only the fact of the disposal of the subject tire soon after the accident in which Ms. Fayard was injured. We do not find such conduct to rise to a level that justifies imposition of the sanctions Firestone recommends. Therefore, dismissal or preclusion of evidence as a sanction for spoliation is not appropriate here.").

²⁷See Benjamin J. Vernia, *Negligent Spoliation of Evidence, Interfering with Prospective Civil Action, as Actionable*, 101 A.L.R.5th 61 at §26(a) (2006)(citing cases including *Hannah v. Heeter*).

C. BECAUSE THE EVIDENCE IS UNDISPUTED THAT MACES SETTLED THEIR CLAIM AGAINST FORD FOR A SUBSTANTIAL SUM IN EXCESS OF THEIR CLAIMED SPECIAL DAMAGES, JUDGE BLOOM SHOULD HAVE CONCLUDED THAT LIBERTY WAS ENTITLED TO SUMMARY JUDGMENT ON THIS ISSUE.

A plaintiff must prove damages to prevail on a spoliation claim.²⁹ Where a spoliation plaintiff recovers more than nominal damages against the alleged tortfeasor, there is no cause of action for negligent spoliation as any damages are speculative. For example, in *Florida Evergreen Foliage v. E.I. duPont de Nemours & Co.*,³⁰ the plaintiffs attempted to prosecute a spoliation claim after settling with a product manufacturer. The court rejected this effort, because the plaintiffs not only “failed, as a matter of law, to allege facts that would show the required degree of impairment, they have also failed to allege the required causal link between the destruction of the Costa Rica field test plants and their alleged damages”³¹ rather, “Plaintiffs’ allegations place the cause of their damage (the agreement to settle their cases for amounts far below the settlement value that would have been reasonable otherwise) on DuPont’s fraudulent concealment of the Costa Rica test and the documents and evidence associated with it.”³² Thus, said the court, “it cannot be found, as a matter of law, that the fifth element of a spoliation of evidence claim (‘a causal relationship between the evidence destruction and the inability to prove the lawsuit’) can be established.”³³

Again, the Maces’ opposition to this assignment of error is minimal:

²⁹Syl. pt. 8, *Hannah*, *supra*.

³⁰165 F. Supp. 2d 1345 (S.D. Fla. 2001).

³¹*Id* at 1361.

³²*Id*.

³³*Id*. (citation omitted).

Liberty Mutual alleges that “because the evidence is undisputed that Maces settled their claim for a substantial sum in excess of their claimed special damages, Judge Bloom should have concluded that Liberty was entitled to summary judgment on this issue.” In attempting to support this proposition, Liberty cites two cases which have no conceivable bearing on the issues in this case (*Florida Evergreen*, in which plaintiffs had apparently failed to “allege facts that would show the required degree of impairment,” and *Hernandez*,³⁴ in which the plaintiff had not timely filed her claim), and then goes on to assert that, because the Maces’ settlement was “substantial,” their spoliation claim is barred. Liberty offers nothing to support such a suggestion by way of what the Maces may show as their total economic and non-economic losses, the magnitude of which will support their argument that the settlement with Ford was a mere token by comparison. There is no basis whatsoever to take this genuine issue of material fact away from the jury, and Liberty’s Brief could not be more deficient on this point. It is properly left to the jury to determine what is “substantial” and what is “nominal.”

Reply Brief at 12.

These facts, however, are not in dispute. First, the Maces settled their claim against Ford for \$50,000.00. Second, the Maces’ special damages were \$38,418.67.³⁵ Thus, the Maces’ settlement with Ford exceeded their special damages by \$10,581.33, which is reasonable considering (1) Ms. Mace lost control of her vehicle on a icy roadway while swerving to avoid another vehicle; (2) Ms. Mace’s vehicle struck a guardrail before rolling over; and (3) the Maces’ own expert could not dispute that an unrepaired ball joint on the Maces’ older, high-mileage vehicle,³⁶ rather than product

³⁴Respectfully, in *Hernandez v. Garcetti*, 80 Cal. Rptr. 2d 443 (1998), a passenger sued a district attorney who had seized a vehicle, later sold by the salvage company that was storing it, and suggested her cause of action did not accrue until she settled her suit against Ford. The court, “[t]he resolution of that lawsuit might have enabled her to better calculate the *amount* of her damages caused by the spoliation, if any, but it was not the event which *caused* her damages.” *Id.* at 447-48. The court focused on the speculative nature of any damages, “The amount of damages for spoliation will often be difficult to prove, even when the underlying lawsuit has been resolved by settlement or verdict. Our Supreme Court has recognized that in a significant number of spoliation cases, even the fact of damages will be ‘irreducibly uncertain.’” *Id.* at 448.

³⁵See Liberty’s Motion for Summary Judgment, Ex. N.

³⁶The Explorer was six years old at the time of the accident and, according to Mr. Mace, had about 117,000 miles on the odometer. See Liberty’s Motion for Summary Judgment, Ex. D.

defect, may have caused the vehicle to rollover. Plainly, this was not the typical rollover case and a \$50,000.00 settlement, as a matter of law, does not reflect a claim "spoiled" by the loss of evidence.

In contrast to the settlement reached by the Maces with Ford based upon the weakness of their case independent from removal from a few suspension parts by the salvage company, here are the Maces' demands in their suit against Liberty:

WHEREFORE, plaintiff Terry Mace demands judgment against defendant Liberty Mutual for compensatory damages in the amount of Ten Million Dollars (\$10,000,000.00), and punitive or exemplary damages in the amount of Thirty Million Dollars (\$30,000,000.00); attorney fees and court costs; and such other and further relief as the Court shall deem appropriate; and

WHEREFORE, plaintiff Donald Mace demands judgment against Liberty Mutual for compensatory damages in the amount of One Million Dollars (\$1,000,000.00), and punitive or exemplary damages in the amount of Three Million Dollars (\$3,000,000.00); attorney fees and court costs; and such other and further relief as the Court shall deem appropriate.

First Amended Complaint and Demand for Trial by Jury at 15-16. Respectfully, this Court should be concerned about plaintiffs settling product liability cases against companies experienced in the defense of product liability claims for amounts such as \$50,000.00, then seeking compensatory and punitive damages in amounts such as \$44 million against third-parties inexperienced in the defense of such claims for allegedly "spoiling" those product liability cases. It is precisely this type of potential abuse which has resulted in most courts rejecting claims for negligent spoliation by third-parties.³⁷

³⁷See Benjamin J. Vernia, *Negligent Spoliation of Evidence, Interfering with Prospective Civil Action, as Actionable*, 101 A.L.R.5th 61 at §2(a) (2006) ("The majority of jurisdictions considering the actionability of negligent spoliation, however, have not recognized the tort, either for parties or nonparties to the underlying dispute.").

Again, where a spoliation plaintiff recovers more than nominal damages against the alleged tortfeasor, there is no cause of action for negligent spoliation as any damages are speculative. In this case, because the Maces recovered more than nominal damages against Ford, Liberty is entitled to summary judgment.

D. BECAUSE THE MACES' EXPERT COULD NOT OPINE THAT A PRODUCT DEFECT, RATHER THAN AN UNREPAIRED BALL JOINT, CAUSED THE ACCIDENT, JUDGE BLOOM SHOULD HAVE CONCLUDED THAT LIBERTY WAS ENTITLED TO SUMMARY JUDGMENT ON THIS ISSUE.

The Plaintiffs' own expert, Thomas J. Feaheny, admitted under oath that (1) he cannot testify that the rollover was caused by any defect in the Explorer because he does not know anything about the circumstances of the accident and there is evidence that an unrepaired ball joint may have caused the rollover,³⁸ (2) he cannot say whether Ms. Mace's injuries were suffered in the initial collision with the guard rail or in the rollover,³⁹ (3) he cannot say how Ford's defenses would have been received because he has no knowledge of the accident or of West Virginia law,⁴⁰ and (4) he cannot say whether the plaintiffs' settlement or judgment would have been greater had the parts never been removed from the Explorer as he has no personal knowledge of Explorer settlements and judgments, and no personal knowledge of any of the circumstances of the accident.⁴¹ The Maces offered no one

³⁸Depo. Tr. of Thomas J. Feaheny, attached as Exhibit B to Liberty's Summary Judgment Reply, at 137-38, 161-66, 218.

³⁹*Id.* at 198.

⁴⁰*Id.* at 137-38, 161-66, 199.

⁴¹*Id.* at 202 ("Q. If Ford Motor Company paid \$50,000 to settle this case, you have no idea as to whether or not that's a high settlement or low settlement, do you? A. I don't know. Q. Because you have no idea what her medical bills were, do you? No, I don't. Q. You have no idea whether she lost any work, do you? A. No, I don't").

to testify that there was any causal link between the removal of the parts from the Explorer and the Maces' settlement with Ford. Moreover, the Maces offered no one to testify that Ms. Mace's injuries were proximately caused by the rollover, as opposed to the initial collision with the guardrail.

In their response, the Maces attempt to impeach their own expert's deposition testimony with his prior affidavit as follows: "In attempting to prop up this argument, Liberty refers to selected responses given by Thomas Faheany . . . carefully not informing the Court of material statements made by this witness in an Affidavit outlining his proposed testimony at trial." Reply Brief at 12-13. The Maces then quote liberally from this affidavit. It is clear from Mr. Faheaney's deposition, however, that this affidavit was the product of counsel,⁴² not Mr. Faheaney:

Q. Did you ever look at the accident report?

A. No.

Q. Did you ever look at the vehicle maintenance records?

A. No.

Q. Did you ever look at the deposition transcript of Terry Mace?

A. No.

Q. Did you ever look at the deposition transcript of Donald Mace?

A. I don't believe so.

Q. Have you ever looked at any of the discovery that's been produced in this case?

A. I don't believe so.

⁴²Indeed, the affidavit, which was tendered a few weeks before Mr. Faheaney's deposition, was nearly verbatim to pleadings previously filed by the Maces' counsel, even though Mr. Faheaney testified that he was supplied information by counsel to allegedly support the allegations of the affidavit on the same day he executed it. *Id.* at 142-43.

* * *

Q. Did you physically examine the Ford Explorer that is the subject of this litigation?

A. My understanding it doesn't exist anymore, at least in an unaltered fashion. But, no, I have not examined the remnants of that vehicle.

Q. Did you examine the alterations of the vehicle?

A. No.

Q. Can you tell me what the alternations to that vehicle were?

A. Well, certain parts of the vehicle were -- have been lost, removed, or otherwise disposed of.

Q. Please itemize for me on the record in this case the specific items that were removed from the Ford Explorer between the time it was in the possession of Liberty Mutual and the time it was examined after the filing of this lawsuit.

A. Well, I don't know when these items were removed, so I can't -- I don't have the knowledge of that whole time period. Between the time the accident took place that underlies this accident and the time that remnants of the vehicle were later found, certain items disappeared. I don't know when they disappeared or how they disappeared.⁴³

* * *

Q. What were the road conditions at the time of the accident?

A. I think we've covered that. I don't know.

Q. Well, doesn't road conditions affect the stability of a vehicle?

A. It can.

⁴³Eventually, Mr. Faheany testified that he believed he had seen a photograph which indicated that parts of the Explorer's suspension had been removed, but admitted that none of the photographs in his file depicted their removal. Depo. Tr. of Thomas J. Feaheny, attached as Exhibit B to Liberty's Summary Judgment Reply, at 142 ("Q. So sir, in any of the photographs I've just handed to you, are you able to observe the removal of the twin I-beam suspension? A. No.").

- Q. Well, were the road conditions dry?
- A. I don't know.
- Q. What if I told you that the roads were snow and ice-covered at the time of the accident?
- A. What about it?
- Q. Would that affect the ability of the vehicle to maintain its stability?
- A. It could, particularly if a vehicle has an excessive center of gravity, excessive rollover propensity.
- Q. Talking about a nondefective manufactured motor vehicle. Isn't it true that vehicles slip on ice and snow?
- A. I think I agree with that. And they are more likely to roll over under those conditions if they have an excessive center of gravity.
- Q. So in this case, you cannot discount the possibility that the Mace vehicle slid on ice and snow, correct?
- A. I don't know if that's true or not.
- Q. Now, how fast was the Mace vehicle going at the time of the accident?
- A. I don't know.
- Q. What highway was it located on at the time of the accident?
- A. I don't know. . . .
- Q. Was she on a four-lane road? Two-lane road? Do you have any idea?
- A. I don't know.
- Q. Was she going down elevation or up elevation?
- A. I don't know.
- Q. How did she lose control of her vehicle?

- A. I don't know.
- Q. Did another vehicle strike her vehicle?
- A. I don't know.
- Q. Did she hit a stationary object prior to the vehicle rolling over?
- A. I don't know.
- Q. Doesn't that have an effect on your opinions?
- A. My opinions are general as to the Explorer design, sir.
- Q. Let me ask you this. If she drove her Ford Explorer off a sheer cliff and it fell 500 feet and it hit rocks and rolled over, would it be your testimony that the fact that it rolled over was because of a product defect?
- A. I don't think so.
- Q. So it's important to know what the conditions were at the time of the accident, isn't that correct?
- A. Not in the detail you're asking me, sir. This is an on-road accident as I understand it, not rolling off a cliff down 500 feet. That's not relevant at all, sir.
- Q. Okay. Did she do an evasive maneuver before the vehicle rolled over?
- A. I don't know.⁴⁴

Thus, the Maces' expert had no factual basis for opining regarding the cause of the accident, which is directly contrary to the statement in his pre-deposition affidavit that, "but for the aforesaid spoliation of evidence, plaintiffs would have prevailed in their aforesaid action against defendant Ford Motor company, as have countless other plaintiffs." Reply Brief at 14. Indeed, Mr. Faheany's

⁴⁴*Id.* at 161-64.

total absence of knowledge regarding any of the circumstances of the accident extended to their suit against Ford:

- A. Yes, I believe I can. I think the value with the twin I-beam components missing is zero. What it would have been had those components been available, I don't know.
- Q. So you think this case had zero settlement value?
- A. As it exists right now, yes, against Ford Motor Company, yes.
- Q. And so it's your testimony that under these circumstances, Ford Motor Company would have paid nothing in settlement, is that correct?
- A. Under the conditions where Liberty Mutual spoliated the evidence, yes.
- Q. You were aware of the fact that the Maces sued Ford Motor Company, were you not?
- A. I believe they were one of the named defendants, yes.
- Q. And I'm sure you've been advised as to what the result of that lawsuit was, have you not?
- A. Not in detail, no. I believe, however, the Maces are pursuing their claim against Liberty Mutual, because they believe that they cannot maintain a claim against Ford because Liberty Mutual spoliated the evidence.
- Q. So your testimony is based upon the assumption that the Maces were unable to pursue their claim against Ford, is that correct?
- A. I believe that's correct.

* * *

- Q. So you weren't aware of the [fact] that Ford Motor Company paid \$50,000?
- A. I have no idea.
- Q. If Ford Motor Company paid \$50,000 to settle this case, you have no idea as to whether or not that's a high settlement or low settlement, do you?

A. I don't know.

Q. Because you have no idea what her medical bills were, do you?

A. No, I don't.

Q. You have no idea whether she lost any work, do you?

A. No, I don't.⁴⁵

If one carefully examines the Maces' response to this assignment of error by Liberty, it is clear that the evidence before the Circuit Court was nothing more than rank speculation by an expert almost totally unfamiliar with anything about the accident or the Maces' claims against Ford that there is a *possibility* that their claim would have been compromised. Indeed, even the Maces' note their expert's "unwillingness to speculate, if any, of the allegation that the 'unrepaired ball joint' had to do with the proximate cause" of the accident. Reply Brief at 14. This Court has said repeatedly that, "although the nonmoving party is entitled to the most favorable inferences that may reasonably be drawn from the evidence, it 'cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.'"⁴⁶ The Maces' case, as can be seen, was based upon nothing other than speculation, and their inability to exclude an unrepaired ball joint as the cause of the accident, which was documented and existed completely independent of any alteration to the vehicle, was a separate ground for the award of summary judgment.

⁴⁵*Id.* at 196-97, 202.

⁴⁶*Marcus v. Holley*, 217 W. Va. 508, 618 S.E.2d 517 (2005), citing *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985) (citation omitted); see also *Chafin v. Gibson*, 213 W. Va. 167, 174, 578 S.E.2d 361, 368 (2003); *Belcher v. Wal-Mart Stores, Inc.*, 211 W. Va. 712, 721, 568 S.E.2d 19, 28 (2002); *Wriston v. Raleigh County Emergency Services Authority*, 205 W. Va. 409, 421, 518 S.E.2d 650, 662 (1999); *Hanlon v. Chambers*, 195 W. Va. 99, 106 n.2, 464 S.E.2d 741, 747 n.2 (1995).

E. JUDGE BLOOM SHOULD HAVE GRANTED SUMMARY JUDGMENT BECAUSE IMPOSITION OF LIABILITY WOULD HAVE VIOLATED LIBERTY'S RIGHTS UNDER THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS.

As previously discussed, the courts in *Metlife*, *Sterbenz*, *White*, and *Fontanella*⁴⁷ all relied upon the concept that it is contrary to the private ownership of property to impose upon a third-party the obligation to preserve that property, particularly where no one outside that ownership interest has either requested preservation nor indicated a firm intention to pursue a suit in which such property might be needed as evidence. Thus, Liberty submits that Judge Bloom should have awarded it summary judgment because to impose liability upon a third-party which, in the absence of any notice of an existing or anticipated claim, sells its own property as mandated by state law, would constitute a violation of the third-party's constitutional rights to due process of law.

Unbelievably, in response to this assignment of error, the Maces argue that Liberty really did not acquire ownership rights in the vehicle which the Maces sold to Liberty and transferred title as required under West Virginia law: "Liberty was thus acquiring a vehicle that was evidence that could be used in a court of law. It stands to reason that, with such knowledge, whether actual or imputed, Liberty could not properly acquire ownership rights unfettered by the obligation to preserve evidence." Reply Brief at 15. [Emphasis supplied]. In other words, any citizen who acquires property that, theoretically, might be used as evidence in an unfiled or unannounced lawsuit cannot acquire ownership of such property; but rather, despite paying full value and having all of the burdens of ownership, such as tort liability, tax liability, and maintenance liability, such citizens

⁴⁷See also *Edwards v. Louisville Ladder Co.*, 796 F. Supp. 966, 970 (W.D. La.1992) ("The courts must also be concerned with interference with a person's right to dispose of his own property as he chooses. This is particularly true where the evidence is in the hands of the third party.").

holds such property in constructive trust for potential claimants, known or unknown, for an indefinite period of time. This, plainly, is completely contrary to the notion of the private ownership of property upon which our nation is founded.

Perhaps no more revealing is the Maces' total disregard for the absurdity of their contention that their manner of addressing the very real scenario discussed in Liberty's Brief of the Appellee regarding a third-party's obligation to preserve its own property for twenty years, which would be the statute of limitations for the claim of an infant:

Liberty Mutual, in its brief, describes a hypothetical case in which the company might be required to preserve a vehicle *ad infinitum*; however, a very simple solution is available to the company. There is no reason why Liberty Mutual cannot, upon receiving notice that one of its insureds has been injured in an Explorer rollover, sent out with its initial paperwork (written claim form, power of attorney, title transfer documents, etc.) a simple notice on a 3" x 8" piece of paper (one-third of a page, requiring no additional postage), with these words:

Liberty Mutual is aware that a number of persons injured in Explorer rollover incidents have filed lawsuits against Ford Motor Company alleging that the vehicle is defectively designed. You may potentially have such a claim and, if so, preservation of your vehicle as evidence may be necessary. As a service to you, our Valued Customer, Liberty Mutual will arrange to store your vehicle in a secure facility to and until [date specified as thirty (30) days from the date of the letter] in order to afford you time within which to seek legal advice, if you so desire, and determine your rights and obligations. Should you desire to have the vehicle preserved after [date specified], it will be **your obligation** to (1) provide Liberty Mutual with written notice of such intention on or before [date specified]; (2) make the arrangements for further storage of the vehicle; and (3) pay the costs thereby incurred. Should you not desire to have the vehicle preserved, you may notify Liberty Mutual of that fact and we will proceed to dispose of it in accordance with our usual procedures.

Such as simple notification would enable Liberty reasonably to discharge its duty not to destroy evidence. In the case of infants, the process becomes admittedly more complicated but can nonetheless be resolved by a summary proceeding designed to protect the rights of the injured child.

Reply Brief at 9. Thus, the Maces' response to the absurdity of imposing an indefinite duty upon a third-party to preserve its own property in the absence of a promise or a request is to enact a statute or promulgate a regulation, through the vehicle of an appellate brief. Obviously, courts do not and should not decide cases based upon statutes and regulations that exist solely in the minds of litigants. Other courts have wisely held that third-parties should not be liable for negligent spoliation of their own property and such issue is an independent reason Liberty is entitled to judgment as a matter of law.

III. CONCLUSION

Because it is undisputed that (1) the vehicle's condition was unaltered from the time it was received by Liberty until it was sold for salvage; (2) the Maces' claim against Ford would have survived summary judgment; (3) the Maces' settled their claim against Ford for in excess of their special damages; (4) the Maces' expert, Thomas Faheaney, admitted that (i) he could not testify that the rollover was caused by any defect in the Explorer because he did not know anything about the circumstances of the accident and there is evidence that an unrepaired ball joint may have caused the rollover,⁴⁸ (ii) he could not say whether Ms. Mace's injuries were suffered in the initial collision with the guard rail or in the rollover,⁴⁹ (3) he could not say how Ford's defenses would have been received because he had no knowledge of the accident or of West Virginia law,⁵⁰ and (4) he could not say whether the Maces' settlement or judgment would have been greater had the parts never been

⁴⁸Depo. Tr. of Thomas J. Feaheny, attached as Exhibit B to Liberty's Summary Judgment Reply, at 137-38, 161-66, 218.


⁴⁹*Id.* at 198.

⁵⁰*Id.* at 137-38, 161-66, 199.

removed from the Explorer as he had no personal knowledge of Explorer settlements and judgments, and no personal knowledge of any of the circumstances of the accident;⁵¹ and (5) the imposition of liability for negligent spoliation by sale of Liberty's own vehicle would constitute a violation of its property and due process rights, Liberty was entitled to summary judgment on additional grounds not addressed by the Circuit Court.

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⁵¹*Id.* at 202 ("Q. If Ford Motor Company paid \$50,000 to settle this case, you have no idea as to whether or not that's a high settlement or low settlement, do you? A. I don't know. Q. Because you have no idea what her medical bills were, do you? No, I don't. Q. You have no idea whether she lost any work, do you? A. No, I don't").

CERTIFICATE OF SERVICE

I, Ancil G. Ramey, do hereby certify that on October 10, 2006, I served the foregoing Reply Brief of the Appellee by depositing true copies thereof in the United States Mail, first class postage prepaid, addressed as follows

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A handwritten signature in dark ink, appearing to read 'A. G. Ramey', is written over a horizontal line.